SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Substantiality of Questions	2
Questions Presented	4
Statute Involved	4
Statement	5
Specification of Errors	9
Reasons for Granting the Writ	
Specification of Error No. I	10
Specifications of Error Nos. II and III	12
Conclusion	21

STATUTES

28 U.S.C. 1254 (1)	2
29 U.S.C. Section 201 to 219; 251 to 262	2
29 U.S.C. Section 206 (a)	4
29 U.S.C. Section 207 (a)	5
29 U.S.C. Section 215	10
29 U.S.C. Section 215 (a)	5

REGULATIONS

Page

Int. Bull. No. 4,T.29, Ch. V Part 778.3 (b) (4) 14

TABLE OF CASES

Bay Ridge Operating Co. v. Aaron,
68 S. Ct. 1186, 334 U.S. 446 17

Skidmore v. Swift & Co.,
323 U.S. 134, 65 S. Ct. 161 15

United States v. Townsley,
65 S. Ct. 413, 323 U.S. 567 21

Walling v. A. H. Belo Corporation,
62 S. Ct. 1223, 316 U.S. 624 17

Walling v. Halliburton Oil Well Cementing
Co., 331 U.S. 17, 67 S. Ct. 1056 20

Walling v. Harnischfeger Corporation,
65 S. Ct. 1246, 325 U.S. 427 17

Walling v. Helmerich & Payne,
65 S. Ct. 11, 323 U.S. 37 17

Williams v. Jacksonville Terminal Co.,
315 U.S. 386, 62 S. Ct. 659 11

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

AVERILLE L. PORTER,
Petitioner,

vs.

GENERAL ELECTRIC COMPANY,
a corporation,
Respondent.

CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Averille L. Porter, the plaintiff below, prays that in the event this Court should grant the petition of General Electric Company for a writ of certiorari in No. 599, at this Term, a writ of certiorari likewise issue to review the decision of the Court below as to

the method of computation of overtime compensation. (R. 89-90, 111, 466-469).

OPINION BELOW

The Opinion of the District Court is not reported but appears at page 87 of the Record. The Opinion of the Court of Appeals for the Ninth Circuit is not yet reported but appears at page 454 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 1953. (R. 479). A petition for rehearing was timely filed but was denied on January 11, 1954. (R. 480). The jurisdiction of this Court was invoked under 28 U. S. C. 1254 (1).

This is a suit for overtime compensation under the Fair Labor Standards Act as Amended, Title 29, Sections 201 to 219, inclusive, Sections 251 to 262, inclusive. The Act is a federal statute involving interstate commerce.

Substantiality of Questions

The questions raised by this petitioner are substantial in that they affect the overtime rate of pay of all persons in the United States and its possessions who are within the coverage of the Act and are em-

ployed on a monthly salary. The method of computation which was used by the Trial Court and approved by the Court of Appeals is highly discriminatory against persons so employed by the month as compared with persons employed by the hour.

Nevertheless, this petitioner would not regard the questions as being of sufficient importance to warrant his making an independent petition for certiorari, particularly since the method of computation used by the courts below appeared to have been sanctioned by this Court; but inasmuch as he feels he can demonstrate the essential injustice of the result, and the matter may never have been fully argued before this Court, and members of the Court itself have expressed some doubts about the method, which does affect a large class of persons, the petitioner believes the Court should review the entire case if it reviews any portion of it. It may be that in the light of experience with the computation methods previously approved, this Court would wish to clarify or revise its holding on the point in the case of **Missel v. Overnight Transportation Co.**, 316 U. S. 572, 62 S. Ct. 1216 and the line of cases known as the "Belo cases."

Accordingly, petitioner is filing this conditional petition, asking for review of petitioner's point only in case the opposing petition is granted.

QUESTIONS PRESENTED

I. Were the Courts below correct in holding that by remaining at work after the employer made a change of hours and working conditions, the employees as a matter of law assented to a new contract of employment at a monthly rate of pay, where that contract violated both the minimum wage and maximum hour provisions of the Fair Labor Standards Act?

II. Were the Courts below correct in determining the claimants' regular hourly rates by dividing the amount of weekly pay by the actual number of hours worked instead of by 40, the number of hours standardized by the Fair Labor Standards Act?

III. Were the Courts below correct in holding that the claimants' monthly salaries had compensated them for "time" for all hours worked so that only half-time was due for the hours worked in excess of forty per week?

STATUTE INVOLVED

The relevant portions of the Fair Labor Standards Act of 1939, as amended, so far as this cross petition is concerned, are as follows:

Title 29 U. S. C.
Section 206 (a):

"Every employer shall pay to each of his em-

ployees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) not less than 75 cents an hour . . ." (1949 Amendment)

Section 207 (a):

"Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 215 (a):

"After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 . . .

(2) to violate any of the provisions of section 6 or section 7 . . ."

STATEMENT

The general factual background of this controversy is set forth in the Petition for Certiorari and the Brief in Opposition. The facts relating solely to the questions involved in this cross petition are as follows:

Averille L. Porter and his fellow-firemen who assigned their claims to him for suit were employed at Richland and North Richland, in the state of Washington, by General Electric Company as a part of that Company's operation of the Hanford Works, a Government atomic plant. They were employed by the hour for a forty-hour week at approximately $1.60 per hour each, with time and one-half for overtime, amounting, when they worked overtime, to approximately $2.40 per hour for all hours over forty. (R. 120, 161, 193, 227, 253, 267, and Findings XI, R. 95).

On March 20, 1950, without consultation or agreement with these firemen, and without giving them any chance for negotiation or contract, the Company changed the schedule of work, placing all of them on a monthly salary with a huge increase in hours of work and no provision whatever for overtime pay. (R. 121, 123, 194, 228, 253, 267, and Finding XI, R. 95).

In one-half of the weeks they worked 72 hours. In one-fourth of the weeks they worked 48 hours. In one-fourth of the weeks they worked 96 hours. (R. 89).

It was the Company's contention that two hours of eating time and eight hours of sleeping time were not duty hours, although the men were living at the

fire station in 24-hour shifts while maintaining homes elsewhere in the two towns. But no overtime was paid for the remaining hours over forty per week, which amounted to 2 hours each in the 72-hour week and 16 hours each in the 96-hour weeks. In other words, the Company did not pay overtime for the admitted work-time hours. (R. 89-90, 464, 126, Pl. Ex. 1, Ex. not in Record, see R. 449, 481).

The Courts below between them have held that all hours spent on the fire station premises were work-time hours and compensable. The Trial Court deducted sleeping time but the Court of Appeals included it.

The question immediately arose in the trial of the case as to what should be the method of computing overtime pay. What does the statute, Section 207 (a), quoted above, mean by the words, "the regular rate at which he is employed?"

Plaintiff and his assignors contended they hired in at the rate of $1.60 per hour, or thereabouts, with $2.40 per hour for all hours over forty per week, and that this approximately should be the overtime rate allowed by the Courts, or, that if the claimants were wrong in this contention, that the proper method of computation of a regular hourly rate would be by dividing the weekly rate (determined by a break-

down of the monthly rate) by 40, the standard number of hours set by Congress, and with that result as a base rate allowing time-and-one-half on the overtime hours.

The Courts below held against the claimants on these contentions and determined the hourly rate by dividing the weekly wage by the actual number of hours worked. On this basis, the longer the men worked, the less they were paid per hour, resulting in some instances in less than the required minimum wage of 75 cents per hour, as against the former prevailing wage of $1.60 per hour, or thereabouts.

Moreover, since the Courts then found that all hours worked had been paid for by the regular monthly salary, instead of allowing an additional amount of time and one-half for the overtime hours, they allowed only half time, resulting in an extremely small rate of pay, amounting to as little as 37½ cents an hour, as against $2.40 per hour prior to March 20, 1950.

In the case of the lowest salaried workers in the instant case, those paid $300.00 per month, it worked out as follows:

$300.00 per month is $69.23 per week.

In a 48-hour week, the hourly pay would be $1.44.

The overtime pay at half-time would be .72 per hour for 8 hours or $5.76 extra for that week.

In a 72-hour week, the hourly pay would be $.96. The overtime pay at half time would be $.48 per hour for 32 hours, or $15.36 extra for that week.

In a 96-hour week, the hourly pay would be $.72. The overtime pay at half-time would be $.36 per hour for 56 hours, or $20.16 extra for that week.

By comparing the result in a 72-hour week with that in a 96-hour week, it will be seen that the employer got 24 additional hours in the longer week for $4.80 more than he paid in the shorter week.

The only correction of this situation made by the Court of Appeals was to direct that no hours should be paid for at less than the statutory minimum of 75 cents, which would mean $.37½ per hour extra for the overtime hours.

SPECIFICATION OF ERRORS

I. The Court of Appeals erred in holding that by remaining at work after the employer made the change of hours and working conditions, the employees assented to a new contract of employment at a monthly rate of pay and were no longer entitled to their old contract rate.

II. The Court of Appeals erred in determining the claimants' regular hourly rates by dividing the weekly wage by the number of hours actually worked per week instead of by 40.

III. The Court of Appeals erred in allowing only half-time as extra pay for all hours worked in excess of 40 per week.

REASONS FOR GRANTING THE WRIT

SPECIFICATION OF ERROR NO. I

The Court of Appeals held that a new contract was created after March 20, 1950, by the employees' remaining at work, and hence their old hourly rate for overtime did not apply.

It was and is the contention of the cross-petitioner that the new contract offered by the employer was illegal because it made no provision whatever for overtime pay, and therefore that no new contract was created when the men remained at work but saw their lawyers. (R. 194.)

The Fair Labor Standards Act, 29 U. S. C., Section 215, heretofore quoted, makes it unlawful for anyone to violate the minimum-wage and maximum-hour provisions of the Act, Sections 206 and 207, with both criminal and civil penalties.

The Court of Appeals cited **Williams v. Jacksonville Terminal Co.**, 315 U. S. 386, 62 S. Ct. 659, as authority for the creation of a new contract by the employees' having remained at work after a change in conditions.

The cross-petitioner respectfully points out that there was nothing violative of the Act in the contract offered to the red-caps by the railroad company. In such a case, to hold that a new contract was created by tacit consent may be but following out a general rule of the law of contracts.

But can the same be said when, as in the case at bar, the proposed contract of the employer is unlawful? Will the law imply consent to an illegal contract?

Both Courts below stated that there is nothing unlawful about paying a fixed salary for a fluctuating work week. (R. 88, 468).

That is true, provided a proper provision is made for the payment of the minimum wage and time-and-one-half for overtime hours. It was not the fluctuating work week, but the failure to provide for overtime pay, even for the admitted work-time hours, which the claimants contend made the contract illegal under Section 215.

If illegal, claimants' consent to it should not be implied as a matter of law.

In **Overnight Motor Transportation Co. v. Missel**, 316 U. S. 572, 62 S. Ct. 1216, concerning a similar contract which had even been negotiated and signed, this Court said:

> "There was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wages. Implication cannot mend a contract so deficient in complying with the law."

For the reasons stated, this Court declined to indulge the usual presumption that the parties contemplated compliance with the law. How much less then should consent to a contract be implied where that consent was never actually given!

If there was no implied assent to the new contract offered, under which the employer immediately began paying them, then the men must still have been working at their old contract rate of approximately $1.60 per hour. This has been claimants' contention throughout the case.

SPECIFICATIONS OF ERROR NOS. II AND III

These two specifications of error involve the

whole of the method of computation of overtime pay used by the Courts below and cannot conveniently be separated for discussion purposes. It was by a combination of the two errors that the Courts arrived at the incredibly low overtime pay allotted to the firemen in this case: First, by dividing the weekly wage by the actual number of hours worked to ascertain the hourly wage; and Second, by computing only half-time on the reduced rate caused by the long overtime hours, whereas the statute distinctly says "one-and-one-half times the regular rate at which he is employed." 29 U. S. C. 207 (a).

The crucial fact of which cross-petitioner here complains is that instead of paying a premium for overtime hours, the employer here pays progressively less for them the longer the men work, resulting in a distinctly sub-standard rate of pay and an inducement to the employer of monthly help to require the longest possible hours.

In arguing against a computation of overtime pay which penalizes the employee and rewards the employer for the imposition of overtime hours, the facts set forth in our foregoing Statement almost speak for themselves without argument.

This anomaly we feel dates from what must have been a mistake on the part of an early Admin-

istrator of the Wage & Hour Division of the Department of Labor—a mistake the consequences of which were not foreseen and have never been fully demonstrated until this present case reached the courts.

In Interpretative Bulletin No. 4, dated Oct. 21, 1938, revised Nov. 1940, now Part 778.3 (b) (4), Title 29, Ch. V., Wage & Hour Division, Code of Federal Regulations, it was stated that the regular rate at which a salaried person was employed was to be determined by dividing the weekly wage by the actual number of hours worked per week, with illustrations.

The Administrator's illustrations all had to do with reasonable work weeks, only a few hours over the standard, lawful, non-overtime week. He apparently did not look far enough ahead to see the ridiculous consequences that would ensue if the employer should institute an 80, 90 or 100 hour work week.

What the Administrator succeeded in doing was not only in nullifying the benefits of the Act so far as salaried workers were concerned, but in making them worse off than before, by giving an inducement to the employer to make them work longer hours. They might receive a small amount of overtime pay, but in no degree commensurate with any large increase in hours worked.

In the case of **Overnight Motor Transportation Co. v. Missel**, 316 U. S. 572, 62 S. Ct. 1216, this Court adopted the method of computation of the hourly rate suggested by the Bulletin. The Court is, of course, not bound by the Administrative proposals, but has held they are entitled to respect and considerable weight, as the Court said in a note to that case, and in the case of **Skidmore v. Swift & Co.**, 323 U. S. 134, 65 S. Ct. 161.

It does not appear from the opinion in the **Missel** case whether or not the method of computation of hourly pay was an important point in the case, or how thoroughly it was argued, or that this Court said in so many words that only half-time, not additional time-and-one-half, would be due for all overtime hours, or that anyone pointed out to the Court the fact that by such a computation of overtime pay, the employer would greatly benefit by any increased hours he could exact from his monthly-salaried employee; that so far from incurring a penalty, as contemplated by the Act, which would make him spread work, he would, in effect, receive a premium by failing to employ more help, because he would be getting the old help at a rate of pay for which no new employee would go to work.

It is difficult to believe that this consequence of

the rule was placed before this Court or argued, for the reason that this Court also said in the same Missel case:

> "We agree that the purpose of the act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and a half provision, but another and intended effect was to require extra pay for overtime work by those covered by the act even though their hourly wages exceeded the statutory minimum. The provision of section 7 (a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage. By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning. 'A fair day's pay for a fair day's work' was the objective stated in the Presidential message which initiated the legislation."

This Court's repeated reference to time-and-one-half pay, not only in the Missel case but in all the cases that have followed, and the fact that this Court has assumed that the employer would be paying more, not less, for overtime hours, make it difficult to believe that the consequences of the decision were

argued or demonstrated, or that this Court really meant that all an employee would get for overtime would be one-half of an already reduced hourly rate of pay — reduced more by each additional hour worked. See **Walling v. Helmerich & Payne,** 65 S. Ct. 11, 323 U. S. 37, wherein the Court again sets forth the beneficient purposes of the act and emphasizes time-and-one-half for overtime. Also **Walling v. Harnischfeger Corporation,** 65 S. Ct. 1246, 325 U. S. 427, wherein the Court stated that a full 50% increase in labor costs and a full 50% wage premium are meant to flow from the overtime provisions of the Fair Labor Standards Act.

In **Bay Ridge Operating Co. v. Aaron,** 68 S. Ct. 1186, 334 U. S. 446 (1948), this Court said:

> "The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra costs."

This exact question was not at issue in the famous case of **Walling v. A. H. Belo Corporation,** 62 S. Ct. 1223, 316 U. S. 624, but the discussion bordering upon the point without quite touching it indicates that this Court was still intent upon exacting a premium for overtime, even though an artificial rate might be set

up to comply. Mr. Justice Reed, however, in his dissent, said this:

> "This Court accepts the view that the Fair Labor Standards Act was intended not only to put a floor under wages but also a ceiling over hours. The limitation of hours in turn had two purposes—the spreading of work and extra compensation for overtime, no matter how high the regular wage may be. **Overnight Motor Transp. Co. v. Missel**, 316 U. S. 572, 62 S. Ct. 1216, decided June 8, 1942. Since overtime pay must be at least equal time and a half the regular rate, as section 7 (a) specifies, employers and employees may not be permitted to contract in avoidance of the statutory requirement . . ."

Under the scheme in the **Belo** case, he goes on to point out:

> "The employee willing, the number of hours which must be worked to earn the guaranty can be increased by suitable adjustment of the contract figures of hourly rate, hours contracted and overtime percentages. By such a verbal device, astute management may avoid many of the disadvantages of ordinary overtime, chief of which is a definite increase in the cost of labor as soon as the hours worked exceed the statutory work week. If the intention of Congress is to require at least time and a half for overtime work beyond a fixed maximum number of hours (40, 42 or 44 hours), that intention is frustrated by today's holding . . . Because there is no increase of labor cost between the statutory maximum and the hours contracted for (54½), the employer has a financial inducement to require hours beyond the statutory maximum."

The same is exactly true in the instant case. Here it is accomplished by a fixed monthly salary for fluctuating hours, ranging from 48 to 96 per week.

The obscurity of the effect is no doubt due to the un-noted difference between the hourly and monthly pay systems. When men are paid by the hour, they get time and one-half for their overtime hours. If the pay is $1.00 per hour, the overtime pay is $1.50 per hour. If the pay is $40.00 per week, the hourly pay **ought** to be $1.00 per hour—but if the man works 50 hours, the overtime is counted in determining the hourly rate, with the result that his hourly pay is only $.80 per hour. And for each overtime hour he will receive not $1.50 but $.40 extra over the amount of his salary.

It is this anomaly which has involved the Courts in endless confusion over rates of pay. It would have been simplicity itself to have determined the hourly rate by dividing the weekly rate by 40, the standard non-overtime hours set by the Congress. Then give time and one-half at that rate for all hours in excess of 40 and we have an easy, understandable and fair rate of compensation, which places the hourly worker and the monthly worker on an equal basis instead of discriminating sharply against the salaried employee.

Mr. Justice Murphy and Mr. Justice Black, dis-

senting in the latest of the "Belo" cases, which likewise sanctioned an 84 hour work week without overtime penalty by the application of an unrealistic contract wage rate, said:

> "The **Belo** case, which carries its own refutation in its dissenting opinion, should therefore be overruled. Otherwise we shall be perpetuating and augmenting the unrealities and confusion which have marked the application of the doctrine of that case. See Feldman, 'Algebra and the Supreme Court,' 40 Ill. L. Rev. 489; 'Legality of Wage Readjustment Plans under the Overtime Provisions of the Fair Labor Standards Act, 13 U. of Chi. L. Rev. 486; 44 Mich. L. Rev. 866." **Walling v. Halliburton Oil Well Cementing Co.**, 331 U. S. 17, 67 S. Ct. 1056.

We are not saying that the case at bar is a **Belo** case, but only that the results—longer hours—are the same, and that both types of cases are subject to respectful criticism because they defeat the purposes of the Fair Labor Standards Act. Both types of cases could have been laid to rest by an initial holding that all basic pay is for a standard, non-overtime week of 40 hours. Then, whether paid by the hour or the week or the month, employees would all be treated alike and receive comparable amounts of overtime pay.

Actually, this Court, in a case in the same volume with the **Helmerich & Payne** case, supra, held for

that method of computation in a case not involving the Fair Labor Standards Act, United States v. Townsley, 65 S. Ct. 413, 323 U. S. 567.

The case involved a basic eight-hour day and forty-hour week under the Independent Offices Appropriation Act, 1935, as applied to Government employees in the Canal Zone. The regular work week consisted of five days of eight hours each. The plaintiff was regularly required to work six days or 48 hours and received no overtime pay. This Court held that he was entitled to overtime, to be computed by dividing his weekly salary by five (not six) to obtain his daily pay, and that he was then entitled to time and one-half of that rate for the extra day.

This is clearly the same method which we contended should be applied in the present case in the event the Court held that claimants were not entitled to their old hourly rate of pay as a basis for computation of their overtime compensation.

CONCLUSION

It is apparent that there is no way of bringing this important question before this Court except by a cross-petition such as this one, yet that the purposes of the Fair Labor Standards Act are defeated by the method of computation of overtime compensation of

monthly salaried employees now in use. We respectfully submit that the decisions of this Court have been misinterpreted by the Courts below and that this Court should review the Specifications of Error set forth in this cross-petition if certiorari is granted on the petition of General Electric Company in Cause No. 599 in this Court.

IVAN MERRICK, JR.
FLORENCE MAYNE MERRICK
THEODORE D. PETERSON
IVAN MERRICK
JOHN HORRIGAN

Attorneys for Cross Petitioner

Horrigan, Merrick, Peterson & Merrick
Of Counsel